No. 282

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GEORGE S. LEISURE, JR.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

-v-

SALVATORE APUZZO,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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GEORGE S. LEISURE, JR.,
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Statement

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York after a trial before Honorable Edward J. Dimock and a jury.

The appellant was tried on two informations: Information No. C 145-283 charging the appellant in two counts with (a) failure to pay the special tax imposed upon persons engaged in the business of accepting wagers and (b) failure to register to pay the tax; and Information No. C 147-278 charging the defendant in one count with conspiring to commit those crimes. The statutes violated are Title 26, United States Code, Sections 2707(b), 3277, 3290, 3291(a), 3292 and 3294, and Title 18, United States Code, Section 371.

After a trial lasting five court days, the jury on November 15, 1955, returned a verdict of guilty on each of the two counts of Information No. C 145-283, and on the one

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After a trial lasting five court days, the jury on November 15, 1955, returned a verdict of guilty on each of the two counts of Information No. C 145-283, and on the one

count of Information No. C 147-278. Appellant was fined $3,000 and sentenced to 60 days imprisonment on Count I of C 145-283, and was placed on probation for four years on Count II of that Information, probation to begin after service of sentence on Count I. On Information No. C 147-278 imposition of sentence was suspended, and a four year probation period was imposed to run concurrently with the first four year period. Defendant was released in $1,500 bail pending this appeal. Two co-defendants, Samuel Aaron and Ernest Broussard, pleaded guilty to Information C 145-283 before trial and are not appealing here.

Prior to trial motions were made as follows:

(a) Motion to suppress and return evidence seized at appellant's butcher shop pursuant to a search warrant (Noonan, J.).

(b) Motion for a bill of particulars (Leibell, J.).

(c) Motion for dismissal of the conspiracy information, C 147-278 (Walsh, J.).

All of the pre-trial motions were denied except that Judge Noonan deferred to the trial judge the question of what documents seized at the butcher shop should be held inadmissible as having no relation to the crime charged. At the conclusion of a memorandum opinion, filed December 23, 1954, Judge Noonan stated:

> "It is my considered opinion that no useful purpose would be served by having a hearing at this time on the issue as to which papers do or do not relate to the lottery business, or which papers do or do not relate to the butcher business.
>
> The rights of the defendant will be preserved because at the trial only such of the seized items as are rel-

evant and material to the criminal charges would be received in evidence by the trial court.

The motion is, accordingly, denied. So ordered."

Statutes Involved

Title 18, United States Code,

"§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

"§ 3651. Suspension of sentence and probation.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is

punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years."

Title 26, United States Code.

"§ 2707. Penalties.

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

"§ 3277. Liability of partners.

Any number of persons doing business in copartnership at any one place shall be required to pay but one special tax.

"§ 3290. Tax.

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable."

"§ 3291. Registration.

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—.

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person."

"§ 3292. Certain provisions made applicable.

Sections 3271, 3273(a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply."

"§ 3294. Penalties.

(a) Failure to pay tax.

Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

. . . . .

(c) Wilful violations.

The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter. (Added Oct. 20, 1951, 2:07 p.m., E. S. T., ch. 521, title IV, § 471(a), 65 Stat. 529.)"

Statement of Facts

During the period of the offenses charged, appellant was the proprietor of a butcher shop located at 363 Lenox Avenue, New York City (6).* This butcher shop was being used as the situs of a large scale policy operation. From July 28 to August 5, 1953, Federal agents made five visits to the butcher shop and placed bets with co-defendants Aaron and Broussard who were employees of appellant. During each of these visits the agents saw people lined up in front of the counter placing bets (Applt.'s App. 7-10, 13-15), and on one occasion when an agent asked Aaron what number had won the day before Aaron pointed to three numerals which were posted on the front of the scales (Applt.'s App. 9).

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* Parenthetical page references are to Government's printed appendix, except where otherwise indicated.

Prior to their visit on August 5, 1953 both agents prepared carbon copies of policy slips, and upon entering the butcher shop they made bets with the originals and kept the carbon copies for evidence (Applt.'s App. 10, 14; Exs. 1, 1-A, 2 and 2-A).

Based on affidavits of the agents who had placed these bets, a search warrant was obtained on August 5, 1953 and executed the same day by Federal officers.

Upon entering the store the officers found appellant, the owner, in a room in the rear. After identifying themselves, the officers questioned the occupants of the store and conducted a search pursuant to the warrant. Initially, appellant denied that he was the owner, and stated that he was merely visiting the store (2, 8).

In the rear room of the store the officers found "several thousand money wrappers" and "several hundred pads of paper". (5). Appellant was then searched, and was found to have $1,366 in cash on his person (2, 8 and Applt.'s App. 26).

Appellant was next escorted to the front of the store and asked to open a safe on the premises. Appellant first denied knowing the combination of the safe, but thereafter he personally opened it (2, 7, 9).

A search of the safe disclosed envelopes containing policy slips (Exs. 3, 4 and 6), as well as between ten and eleven thousand dollars in cash (8, 9 and Applt.'s App. 15).

Having found some evidence of gambling, the officers demanded from appellant all other policy slips on the premises. At this point appellant turned to his employee,